

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|-----------------------------------|---|-----------------|
| APPLICATION OF LOYD J. COLE FOR |) | |
| DECLARATION BY PUBLIC SERVICE |) | |
| COMMISSION OF ABSENCE OF CONTROL |) | |
| OF ORBIT GAS COMPANY AS A RESULT |) | |
| OF ACQUISITION OF CERTAIN SHARES |) | CASE NO. 90-263 |
| OF ORBIT GAS COMPANY OR IN THE |) | |
| ALTERNATIVE FOR APPROVAL OF |) | |
| ACQUISITION OF "CONTROL" OF ORBIT |) | |
| GAS COMPANY |) | |

O R D E R

On August 31, 1990, Loyd J. Cole applied for an Order declaring that his acquisition of 77,013 shares of common stock of Orbit Gas Company ("Orbit") does not constitute the transfer or acquisition of control of Orbit within the meaning of KRS 278.020; or, in the alternative, for Commission approval of his acquisition of an additional 77,013 shares of common stock of Orbit. He subsequently amended his application to reflect the purchase of an additional 1,050 shares. Mr. Cole, by waiver, executed November 14, 1990 agreed to extend the 60 days statutory period for Commission review and action under KRS 278.020(5) up through and including December 31, 1990. A public hearing was held December 3, 1990 in the Commission's offices.

After consideration of the evidence of record, being otherwise sufficiently advised, the Commission finds the following:

1. Orbit owns, controls, operates, and manages facilities used, or to be used, in connection with the distribution and sale

of natural gas and the transporting and conveying of gas to or for the public for compensation and is a public utility subject to the jurisdiction of the Public Service Commission. KRS 278.010, KRS 278.040.

2. KRS 278.020(5) provides that

"No individual. . .shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any such acquisition of control without such prior authorization shall be void and of no affect. As used in this subsection, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise. Control shall be presumed to exist if any such individual. . .directly or indirectly, owns ten percent (10%) or more of the voting securities of the utility. . . ."

3. Orbit currently has 2,000,000 shares authorized and 589,821 shares of common stock outstanding.

4. Orbit has only 580 shareholders. Its shares are thinly traded.

5. Loyd J. Cole's holdings after acquisition of the 78,063 shares brings his current holdings to 100,484 shares of common stock in Orbit or 17.4 percent of Orbit's outstanding shares.

6. With his current shareholdings and cumulative voting procedures contained in Kentucky Law, Ky. Const. §207, Mr. Cole can, at best, elect himself to the board of directors with an undetermined amount of excess shares. With the minimum quorum of four directors, as currently required by Orbit's corporate bylaws,

Mr. Cole, as a director, does not have the power to control the outcome of any vote of Orbit's Board of Directors.

7. Mr. Cole has not entered into any express or implied agreements, understandings, or voting trusts which affect the manner in which he will vote his shares of Orbit or which will affect his vote as a director of the corporation.

8. Securities and Exchange Commission regulations require disclosure of any agreement, voting trust, or agreement to influence the management and policies of a publicly traded corporation. Failure to disclose such agreement is a criminal offense subject to fine and imprisonment. See 15 U.S.C. §78ff.

9. Neither Mr. Cole nor any other person has filed any statement with the Securities and Exchange Commission indicating an agreement between Mr. Cole and others to influence the management and policies of Orbit.

10. No evidence exists of any concerted action between Mr. Cole and others to influence the management and policies of Orbit.

11. Mr. Cole is not employed by Orbit as an executive officer or in any other policymaking position, although he does manage a wholly-owned subsidiary of Orbit.

12. As of August 15, 1990, the members of Orbit's Board of Directors as a group beneficially own 23.3 percent of the outstanding common stock of Orbit.

13. The existing management of Orbit, through its control of Orbit's stock proxy process, can prevent Mr. Cole from using his current stockholdings to obtain a majority of seats upon Orbit's Board of Directors.

14. Based upon the foregoing, control or the power to directly or indirectly cause or direct the management and policies of Orbit did not pass to Loyd J. Cole when he acquired Orbit stock on July 30, 1990.

15. Mr. Cole has rebutted the presumption of control created by operation of KRS 278.020(5).

16. Mr. Cole's acquisition of more than 10 percent of the outstanding voting securities of Orbit does not require Commission approval since control of Orbit has not passed to him.

IT IS THEREFORE ORDERED that:

1. Mr. Cole's acquisition of 78,063 shares of Orbit common stock does not constitute the transfer or acquisition of control of Orbit within the meaning of KRS 278.020(5).

2. This case is closed and shall be removed from the Commission's docket.

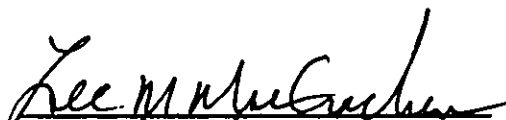
Done at Frankfort, Kentucky, this 20th day of December, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

ATTEST:


Executive Director


Commissioner